

KEKER & VAN NEST LLP
 ROBERT A. VAN NEST - # 84065
rvannest@kvn.com
 CHRISTA M. ANDERSON - # 184325
canderson@kvn.com
 MICHAEL S. KWUN - # 198945
mkwun@kvn.com
 633 Battery Street
 San Francisco, CA 94111-1809
 Tel: 415.391.5400
 Fax: 415.397.7188

KING & SPALDING LLP
 DONALD F. ZIMMER, JR. - #112279
fzimmer@kslaw.com
 CHERYL A. SABNIS - #224323
csabnis@kslaw.com
 101 Second Street, Suite 2300
 San Francisco, CA 94105
 Tel: 415.318.1200
 Fax: 415.318.1300

KING & SPALDING LLP
 SCOTT T. WEINGAERTNER
(Pro Hac Vice)
sweingaertner@kslaw.com
 ROBERT F. PERRY
rperry@kslaw.com
 BRUCE W. BABER (Pro Hac Vice)
 1185 Avenue of the Americas
 New York, NY 10036
 Tel: 212.556.2100
 Fax: 212.556.2222

IAN C. BALLON - #141819
ballon@gtlaw.com
 HEATHER MEEKER - #172148
meekerh@gtlaw.com
 GREENBERG TRAURIG, LLP
 1900 University Avenue
 East Palo Alto, CA 94303
 Tel: 650.328.8500
 Fax: 650.328.8508

Attorneys for Defendant
 GOOGLE INC.

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

ORACLE AMERICA, INC.,

 Plaintiff,

 v.

 GOOGLE INC.,

 Defendant.

Case No. 3:10-cv-03651 WHA

**GOOGLE INC.'S OPPOSITION TO
 ORACLE AMERICA, INC.'S MOTION TO
 ADMIT TRIAL EXHIBIT 1026**

Dept.: Courtroom 8, 19th Floor
 Judge: Hon. William Alsup

1 Google opposes Oracle America's motion seeking to admit Trial Exhibit 1026. This
 2 Exhibit, if admitted, would be far more prejudicial than probative of any issue in this case, and
 3 certainly of any issue in either of the liability phases of this trial. Oracle's motion contains
 4 several misleading omissions that underscore precisely the concerns about prejudice and
 5 confusion that should keep this exhibit out of evidence under Rule 403.

6 Oracle's motion begins with a quote from the Court as it sustained Google's objection at
 7 trial, noting that 1026 "will be in limbo for awhile." (Br. at 1.) But as the Court also stated:
 8 "[I]t's okay for you to say that a license was entered into and move on to something new, but to
 9 get into these specific details like this, I'm beginning to see the merit in the 403 objection."
 10 (4/20/2012 Tr. At 1060:24-1062:2.) For good reason. Oracle's brief confirms that the 403
 11 objection was correctly sustained and that the Court should uphold its exclusion.

12 Oracle claims that the Danger License "confirms that Mr. Rubin sought and obtained a
 13 license for Danger *without* Danger having used any Sun source code." (Br. at 1 (emphasis in
 14 original).) Specifically, Oracle refers to a paragraph in the License as support for the proposition
 15 that "Danger paid for a license to nothing but the Java Specifications." This selective quote
 16 fundamentally mischaracterizes the exhibit. The ellipsis masks the fact that *code was actually to*
 17 *be delivered by Sun* under the terms of the agreement. (See TX 1026 at 31-32.) As the Danger
 18 License states:

19 The parties acknowledge that, *except for the Shared Part delivered to You by*
 20 *Original Contributor [Sun Microsystems]*, Original Contributor has not
 21 provided You under this License, and You assert that You have not accessed any
 22 Original Code, Upgraded Code or other Technology.

23 *Id.* (emphasis added). The Original Contributor is defined as "Sun Microsystems, Inc." (*id.* at 17)
 24 and the contract defines the Shared Part as code:

25 e) "Shared Part" means **those Original Code and Upgraded Code**
 26 files of the Technology which are identified as "shared" (or words of similar
 27 meaning) or which are in any "share" directory or subdirectory thereof, except
 28 those files specifically designated by Original Contributor as modifiable.

Id. at 18 (emphasis added). Moreover, when deposed on this topic, Mr. Rubin testified that *Sun*
required licensees to take the Shared Part. (TX 18 (emphasis added).) In other words, Oracle's

1 primary basis for seeking the admission of Trial Exhibit 1026 is based on an incorrect and
 2 misleading citation of the Exhibit. For this reason alone, Oracle's motion should be denied.

3 Whether or not anyone at Android "thought" or "knew" it "needed" a license has no
 4 bearing on the issue of liability in this case, and would be hopelessly confusing even in the
 5 damages phase. As the above quotation shows, looking at plaintiff's brief in the most favorable
 6 light, even Oracle is confused. The confusion of the jurors can be expected to be far worse.

7 Oracle's argument that the Danger License shows that "Sun has required a license for API
 8 specifications for at least a decade" is also misleading. (Br at 3.) Nowhere in the License are
 9 APIs broken out for purposes of a separate license, and Oracle does not point to anything in the
 10 License in support of its position.¹ In any event, Oracle does not deny that APIs have been
 11 around for many years before Java was implemented. (4/19/2012 Tr. at 699 at 14-17). That APIs
 12 might be mentioned as part of a larger bundle of rights is, therefore, hardly surprising. Oracle's
 13 attempt to mischaracterize the Danger License as recognizing APIs as a discrete, stand-alone
 14 form of protectable IP reveals Oracle's strategy to try to confuse the jury on this issue—and the
 15 danger of admitting Trial Exhibit 1026 into evidence.

16 Oracle also fails to point out that that the Danger License apparently encompasses the
 17 conveyance of a trademark license under the Java brand. The Danger License states: "Has
 18 Trademark License been executed?: Yes". (Tr. Ex. 1026, at 8.) This is precisely the opposite of
 19 the situation with Android, which never sought to market itself as Java or even Java-compliant,
 20 compounding the prejudice and further confusing the jury.

21 Oracle also argues that the Danger license "is relevant because it rebuts Google's
 22 contention that Java technology was never used for any smartphone, and that Google's copying
 23 was therefore transformative and excusable as fair use." Even if Oracle could prove that Danger
 24 was a successful mobile platform, Oracle should pursue that goal through testimony about the
 25 product itself—not through an agreement that has nothing to do with the design of the phone.
 26 The License is probative of none of those issues.

27 ¹ To the contrary, the Danger License expressly grants rights "covering the Original Code,
 28 Upgraded Code and Specifications." (TX 1026 at 10.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: April 23, 2012

KEKER & VAN NEST LLP
/s/ Robert A. Van Nest
By: ROBERT A. VAN NEST
Attorneys for Defendant GOOGLE INC.